JD–13–04
Rochester, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SIEMENS BUILDING TECHNOLOGIES, INC.

and

Cases 3–CA–24050
3–CA–24304

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 832

Greg Lehmann, Esq.,
for the General Counsel.
Stanley J. Garber, James P. Daley, and David M. Novack, Esqs., (Bell, Boyd, and Lloyd, LLC), of Chicago, IL,
for the Respondent.
Peter C. Nelson, Esq., (Shapiro, Rosenbaum, Liebschutz, and Nelson, LLP),
of Rochester, NY, for the Charging Party.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge: On January 23, 2003 and June 17, 2003, the International Union of Operating Engineers, Local 832, Union herein, filed charges in cases 3–CA–24050 and 3–CA–24304, respectively, alleging that Siemens Building Technologies, Inc., Respondent herein, committed certain unfair labor practices.

On August 27, 2003, the National Labor Relations Board, by the Regional Director for Region 3, issued a Consolidated Complaint, herein complaint, which alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, herein the Act, when it failed and refused to recognize and bargain with the Union, when it told prospective employees that as a condition of employment they had to resign their membership in the Union and when it conducted a poll to determine if its employees wished to be represented by the Union or not.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Buffalo, NY, on October 6, 7, and 8, 2003.

Based on the entire record in this case, to include post hearing briefs submitted by counsel for the General Counsel, Respondent, and Charging Party, and on my observation of the witnesses and their demeanor, I make the following

Findings of Fact

I. Jurisdiction

Respondent has an office and place of business in Rochester, New York.

In December 2002 Respondent finalized an Installation Operation and Maintenance Agreement with the Monroe Newpower Corporation, a non-profit group, which owned the Iola Power Plant. Under the agreement, among other things, the coal-fired Iola Power Plant was to be decommissioned and replaced by two gas-fired cogeneration facilities. The coal-fired Iola Power Plant was to remain in operation until decommissioned and replaced.

Respondent admits that it annually purchases and receives at its Rochester office goods and services valued in excess of $50,000 directly from points located outside the state of New York.

Respondent further admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Overview

The Iola Power Plant is a coal-fired power plant, which until the end of 2002 was owned and operated by Monroe County. Monroe County, a political entity, had a contract with the Union, which covered many county facilities to include the Iola power plant. The most recent collective bargaining agreement between Monroe County and the Union ran from January 1, 2000 to December 31, 2003, which agreement covered the employees who worked at the Iola Power Plant.

In 2002 Monroe County sold the Iola Power Plant to Monroe Newpower Corporation, a non-profit corporation.

Respondent, Siemens Building Technologies, Inc., entered into an Installation Operation and Maintenance Agreement with Monroe Newpower Corporation.

The terms of the agreement were that Respondent would take over the Iola Power Plant on January 1, 2003 and operate it as a coal-fired facility until it was decommissioned and replaced by two gas-fired cogeneration facilities.

The Union represented the employees who ran the coal-fired Iola Power Plant.

It was obvious the Respondent would need people, i.e., firemen and engineers, to run the power plant during the time it took to decommission the old plant and replace it with the new cogeneration facility, which would require employees who operated the new facility to have different expertise than the expertise required to run the Iola Power Plant.

B. Negotiations Begin Between the Union and Respondent

Before the Respondent took over the power plant it engaged in negotiations with the Union regarding the employees needed to run the plant.

The Union and Respondent met on two occasions, i.e., December 12, 2002 and December 19, 2002.

Respondent, through its witness, Service Operations Manager Scott McKee, claims there was a third meeting on December 24, 2002 where the Union flat out rejected Respondent's final offer. I do not credit McKee's testimony in this regard and find that no negotiations or meeting took place between Respondent and the Union on December 24, 2002. McKee claims that Union officials Michael Scahill and James Glathar were present at this December 24th meeting. Scahill and Glathar testified that there was no such meeting and no negotiations and that they were on Christmas leave on December 24 and their calendars introduced into evidence corroborate them. McKee testified that Michael Yacos and Tom Garrett, two members of Respondent's management team and employee Tim Berna were present at the meeting. Garrett did not testify. Yacos said he was at the plant on December 24 but couldn't identify Scahill or Glathar as being present and didn't testify about any discussions regarding a contract. Berna doesn't remember Scahill or Glather being at the plant.

Accordingly the only two negotiating sessions that took place were on December 12 and December 19, 2002.

Respondent did not take over the power plant until January 1, 2003 and did not hire any employees until December 30, 2002. When the parties met on December 12 and December 19, 2002, Respondent had not hired any employees to run the power plant.

At the December 12 meeting, Respondent said it was amenable to reaching an agreement with the Union. On the following day, December 13, the Union left some proposals at Respondent's office.

On December 18, the day before the scheduled second meeting Respondent e-mailed to the Union a proposal for a complete agreement effective, January 1, 2003, which contained the following proposed language as to the term of the agreement:

> " This Agreement will terminate on the earlier of eighteen (18) months from its Effective Date or that date on which the Employer completes its work with respect to the operation of the existing Iola Power Plant or the date on which the Employer is relieved of its obligations under its agreement with its customer to operate the existing Iola Power Plant or the date on which said agreement is terminated. This Agreement will not apply to any construction and repair related work done by the Employer at the existing Iola Power Plant after the existing Iola Power Plant closes operations."

The parties met on December 19. They adjourned with the understanding that the Union would draft some language and present it to the Respondent. The Union delivered its proposals to Respondent later on December 19 after the meeting ended.

Also late on December 19, Respondent faxed and e-mailed to the Union what Respondent referred to as its "final offer" and requested that the Union let Respondent know what its decisions is "by Friday, December 20th at 12 noon."

The Union's Michael Scahill left a message at Scott McKee's office to the effect that the Union had some problems with Respondent's proposal and the parties should talk further after the holidays. Christmas, needless to say, was just days away on December 25. In addition the Union offices were closed for the holidays on both December 24 and December 25.

The principal dispute between the Respondent and the Union centered around the "term" of the collective bargaining agreement. Respondent wanted the relationship between Respondent and the Union to terminate once the two new cogeneration facilities were on line and the old plant decommissioned because the jobs duties would differ. The employees at the new facility would be working with turbines. The Union wanted the relationship to continue beyond the two new cogeneration facilities coming on line because the people they represented could be trained on turbines and indeed the Union represented employees elsewhere who had turbine experience and told this to Respondent.

On December 23 the Union sent the following e-mail to Respondent:

> "FROM: Jim Glathar
>
> SENT: Monday, December 23, 2002 11:58 AM
>
> TO: 'McKee Scott'
>
> Scott,
>
> After conferring with our attorney this morning there are a few things in the collective bargaining agreement that we need to discuss, we will be putting together a counter proposal package for you to look at but with the current work load and the upcoming holidays we are having difficulties getting this prepared. Our office will be closed on the 24th and 25th for the Christmas holiday and I will be out of town on the 26th and 27th. Mike [Scahill] is off today but will be here on Thursday and Friday the 26th and 27th. Hopefully we can get something for you to look at before we schedule another meeting.
>
> Some of our concerns are with the time frame for the grievance procedures, how the health insurance payments are earned, Seniority, and some other issues that we have. Mike or myself will be in touch with you right after the Christmas Holiday to schedule a meeting so that we can settle some of these outstanding issues.
>
> Have a merry Christmas,
>
> Jim Glathar"

On December 30 Respondent hired the crew it would need to run the Iola Power Plant beginning January 1, 2003, when Respondent took over the operation of the plant. It is stipulated by the parties that a majority of the work force hired by Respondent were former employees of Monroe County who had been represented by the Union.

On January 2, 2003 the Union, by Business Representative Michael Scahill, sent Respondent a letter requesting Respondent to recognize the Union and to bargain with it.

On January 3, 2003, Respondent, by Scott McKee, wrote a letter to the Union saying Respondent was forwarding the Union request for recognition and bargaining to its attorneys.

On January 16, 2003, Respondent's attorney, Stanley J. Garber, sent a letter to the Union denying the Union's requests for recognition and bargaining.

C. Is Respondent a Successor

The mere fact that the employing entity changes from a governmental unit, or public sector employer, such as a state or county, to a private sector employing entity does not mean the new employer — the private sector employer — is not a successor. See, *Lincoln Park Zoological Society*, 322 NLRB 263 (1996), enfd., 116 F.3d 216 (7th Cir. 1997). The new employer can be a successor if it meets certain other criteria.

The Supreme Court, in *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272 (1972), held that a new employer has a duty to recognize and bargain with the incumbent Union when two general factors, which can be summarized as (1) continuity of the work force and (2) continuity of the enterprise, are present. Although *Burns* dealt with a successor employer's bargaining obligations to a newly certified Union, it is clear that the *Burns* rationale is equally applicable to situations where the Union is the established bargaining agent. *Fall River Dyeing and Finishing Corp. v. NLRB,* 482 U.S. 27 (1987).

In order to establish a "continuity of the work force," the former employees of the predecessor who were employed in the predecessor's bargaining unit must comprise a majority of the new employer's complement within that same bargaining unit.

After establishing the continuity of the work force, the analysis proceeds to the second factor: the continuity of the enterprise. In evaluating the continuity of the enterprise, the Board looks to the following elements: (1) whether there was been substantial continuity of the same business operations; (2) whether the new employer uses the same facilities; (3) whether the same jobs exist under the same working conditions; (4) whether the new company employs the same supervisors; (5) whether the same equipment, machinery or processes are used: (6) whether the same products or services are offered; and (7) whether the new employer has basically the same body of customers. *Fall River Dyeing,* supra; see also: *Sierra Realty Corp.,* 317 NLRB 832 (1995); *Nephi Rubber Products Corp.,* 303 NLRB 151 (1991), enfd. 976 F.2d 1361 (10th Cir. 1992). The totality of the circumstances frames the analysis and the Board does not give controlling weight to any single factor. *Premium Foods, Inc.,* 260 NLRB 708, 714 (1982), enfd. 709 F.2d 623 (9th Cir. 1983).

An employer can be found to be successor even if it purchases or assumes only a part of the predecessor's operations. *Miami Industrial Trucks,* 221 NLRB 1223, 1224 (1975).

The Board and the courts have emphasized that the question of whether or not there is substantial continuity between the old and new business is to be examined from the perspective of the employees affected. The pertinent inquiry is whether there has been enough of a change in operations to defeat the employees' expectation of continued Union representation. *Fall River Dyeing,* supra; *Premier Products, Inc.,* 303 NLRB 161 (1991); *Capitol Steel and Iron Co.,* 299 NLRB 484 (1990).

Generally, another consideration in evaluating a *Burns* successor is whether there has been a hiatus between the cessation of the old operation and the commencement of the new business. *Fall River Dyeing,* supra. As a rule, the longer the hiatus, the less likely an entity will be deemed a successor.

In *Burns,* the Supreme Court enunciated the principle that, "a successor employer is ordinarily free to set initial terms on which it will hire employees of a predecessor" without first bargaining with the employees' bargaining representative. The Court recognized an exception to this principle, however in "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit. . ." 406 U.S. at 294-95. The Board interprets this phrase to encompass situations whether the successor's plan includes every employee in the unit as well as those where it includes a lesser number but still enough to make it evident that the Union's majority status will continue. *Spitzer Akron, Inc.,* 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976), cert. den, 429 U.S. 1040 (1977), *Fremont Ford Sales, Inc.,* 289 NLRB 1290, 1296 (1988).

In *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), the Board promulgated a specific test to determine whether the exception in *Burns* applies. Specifically, the Board found that the exception applies if either of the following circumstances exist: (1) where the new employer has actively or, by tacit inference, misled employees into believing they would be retained without change in their wages, hours, or conditions of employment; or (2) whether the new employer has failed to announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. 209 NLRB at 95.

A successor employer's obligation to recognize and bargain is triggered by the incumbent Union's request for recognition and/or bargaining. It has long been held that a valid request for recognition and/or bargaining need not be made in any particular form so long as the request clearly indicates a desire to bargain and negotiate on behalf of the unit employees.

It may be difficult in some cases to determine at precisely what point in time a new employer is obligated to bargain. Thus, the Supreme Court has held that a new employer's obligation to bargain attaches when it has hired a "substantial and representative" compliment within the unit. *Fall River Dyeing,* supra. In determining the existence of a substantial and representative compliment, the Board must consider whether the job classifications designed for the operation were filled or substantially filed at the time the demand for recognition or bargaining was made; whether the operation was in normal or substantially normal production at the time of the demand; the size of the bargaining unit complement on the date of the demand; that the relative certainty of any new employer's claim that anticipated expansion makes its current unit employee complement not substantial and representative of its normal operations.

Respondent took over operation of the Iola Power Plant on January 1, 2003. It is stipulated by the parties that a majority of the employees represented by the Union who worked at the Iola Power Plant worked at the Power Plant after Respondent took over its operation.

> The stipulation read into the record was as follows: "The majority of the employees hired by respondent, Siemens Building Technologies, at the end of December 2002 had been employed just prior thereto by Monroe County and employed at the Iola Power Plant. These employees include Timothy Berna, B-E-R-N-A, Ray O'Dell, O- capital D-E-L-L, John Ciminelli, C-I-M-I-N-E-L-L-I, Anthony Pursati, P-U-R-S-A-T-I, and Michael Healy, H-E-A-L-Y.

The stipulation will also include that the following employees worked at the Iola Power Plant within the previous five months of December of 2002, and those employees include Henry Brown, Paul McBride, James Muhs, M-U-H-S, and Daniel Steinfeldt, S-T-E-I-N-F-E-L-D-T.

And furthermore, respondent also hired on December, at the end of December 2002, two part-time employees that had been employed just prior thereto by Monroe County at Iola Power Plant, which includes Rob Camalari, C-A-M-A-L-A-R-I and Jim White, who had been hired ----

JUDGE LINSKY: Off the record
(Off the record)

JUDGE LINSKY: On the record
Mr. Lehmann?

MR. LEHMANN: Can we go off the record.

JUDGE LINSKY: Off the record.
(Off the record)

JUDGE LINSKY: On the record
Mr. Lehmann, on the last two.

MR. LEHMANN: On the last two, involving the part-time employees, the stipulation would read that Robert Cammilleri, C-A-M-M-I-L-L-E-R-I, was hired as a part-time employee by the respondent had been employed just prior thereto by Monroe County at the Iola Power Plant. And Jim White had previously worked at the Iola Power Plant." (Tr. 109-110).

Richard Healy testified without contradiction that the work done by the Union represented employees at the Iola Power Plant was the same after Respondent took over as before. There was no hiatus in operations.

The Iola Power Plant was operated the same as before and serviced the same customers.

It is clear that Respondent is a *Burns* successor with an obligation to recognize the Union and bargain with it.

The failure of the parties to reach agreement on a new contract may be grounds for Respondent to declare a lawful impasse and unilaterally implement its last best offer but it is not grounds for Respondent to refuse to recognize and bargain the Union.

The duty to recognize and bargain with the Union is not terminated if the Respondent and the Union cannot agree on a collective bargaining agreement.

D. Alleged Section 8(a)(1) statements by Respondent's Agent Beatriz Pyle

On December 30, 2002, when Respondent was in the process of offering jobs to the employees to work at the Power Plant Beatriz Pyle, an admitted agent of Respondent, told the

employees that, as a condition of employment, they had to resign their membership in the Union.

Employees Tim Berna and John Ciminelli called Union Representative Michael Scahill who caused a Union attorney to tell Respondent that what was said was illegal. In addition, Scott McKee overheard Ms. Pyle make the comment. McKee contacted Respondent's counsel who instructed McKee to let the employees immediately know that as a condition of employment they did not have to resign their membership in the Union. This was done within 15 minutes of Ms. Pyle's unfortunate statement. None of the employees who heard Ms. Pyle's statement resigned from the Union.

In addition, Respondent posted a notice that same day which remained on the bulletin board for 3 months and which provided as follows:

> "Date: 12/30/2002
> To: IOLA Plant Employees
> From: Scott N. McKee
> Priority: [Urgent]
>
> This will confirm our discussion today concerning the status of the jobs in the IOLA Power Plant. Siemens Building Technologies was unable to reach an agreement with the union, and the positions that have been offered to you are non-union jobs.
>
> Employees at the Iola Plant can elect to give up their current union membership, however, this will not be required as a condition of employment. The earlier communication on this matter was a misunderstanding concerning the transition process.
>
> Please address any concerns with this issue directly with me.
>
> Thank you."

Respondent's very prompt and appropriate disavowal of Ms. Pyle's statement that as a condition of employment the employees would have to resign their Union membership leads me to conclude that Pyle's statement, since promptly retracted, did not amount to a violation of Section 8(a)(1) of the Act. If Respondent had not retracted Pyle's statement or was dilatory in doing so I would find a violation of the Act. I believe all counsel agreed on this but prompt corrective action avoids a finding of an unfair labor practice. I note again that no employee withdrew from the Union. See, *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

I denied as untimely counsel for the General Counsel's motion to amend the complaint to allege a violation of Section 8(a)(1) of the Act because of the statement in McKee's memo of December 30, 2002 that "the positions that have been offered to you are non-union jobs." Although the memo had only recently come into the possession of the General Counsel it had been posted from December 2002 to March 2003. The hearing before me was in October 2003. However, the statement that the jobs offered "are non-union jobs" is further evidence of Respondent's unlawful refusal to recognize and bargain with the Union.

E. Why Respondent Claims It Didn't Recognize and Bargain with the Union

On direct examination Service Operations Manager Scott McKee was questioned by Respondent's attorney. Pertinent testimony was as follows:

"Q My question to you is, and in the General Counsel Exhibit 9, written by Mr. Garber to Mr. Scahill denies 832's request for recognition and negotiations. Why did Siemens not recognize and continue to negotiate with 832 in January 2003?

A There was basically two reasons.

Q What are they?

A We had already been down this road, trying to negotiate with them, and we hadn't gotten anywhere.

Q But what in particular was the stumbling block?

A That they wanted to have a scope that went beyond the Iola power facility.

Q Had you had any indication that Local 832 was going to relent on that position?

A No.

Q All right.

A And the second reason was that we didn't feel that the employees wanted to have the Union represent them anymore.

Q Did you have a basis for this belief?

A Yes, when the original offers were presented to the Union the ---

Q To the Union?

A When we had presented the offer to the Union, the Union did not take that offer back to the employees that it was going to affect.

Q How do you know that?

A Because they had told me that, and they mentioned that they were upset because they thought that, after seeing the offer that was a clear offer.

JUDGE LINSKY: Now you say they told you, who is they?

MR. NOVAK: Your Honor, on this ----

JUDGE LINSKY: No, no, no. I'm saying he sounded like he could be saying the Union told them something rather than the persons who were made offers.

THE WITNESS: The persons that were made offers.

Q So you said there were four factors that (unclear).
A The second one was that when I had mentioned that the positions that were going to be offered were non-union positions, nobody objected to that.

Q So they all accepted the offer knowing full well it was a non-union job?

A Correct

Q Three?

A Again, when I mentioned that these were non-union positions nobody expressed an interest in (unclear) them.

Q And to this day has anyone expressed an interest in having the Union at Iola?

A No.

Q Anything else?

A The fourth reason was I had a couple of the employees that are now working for Siemens come up to me and say that the Union had not done anything for them, therefore they had no ---

MR. LEHMANN: Objection, Your Honor, hearsay.

THE WITNESS: They told me.

MR. LEHMANN: Hearsay

MR. NOVAK: Your Honor, I'm not offering that for the truth. I'm offering it for the fact that it was said.

JUDGE LINSKY: Objection overruled. Not introduced for the truth of the matter stated, but for the state of mind of the respondent when they made the decision not to recognize the Union?

MR. NOVAK: Correct

JUDGE LINSKY: All right

MR. NOVAK: Could I have the record read back to see the last part of his answer about employees' statements to him?

Q Why did Siemens decide to poll its employees?

A It was apparent that there were employees that did not necessarily have the Union represent them. So we wanted to verify that." (Tr. 136-139).

On cross-examination by counsel for the General Counsel the following testimony was elicited:

"Q Now going to the four reasons that you had indicated previously in your testimony of why Siemens denied recognition and bargaining. The fourth reason that you testified to was that a couple of employees had told you that they weren't happy with the Union, is that correct?

A Not exactly.

Q You testified that these employees had told you that the Union hadn't done anything for them?

A That's correct.

Q Can you identify who these employees are?

MR. NOVAK: I'm going to object, Your Honor. We are very concerned that this Union will retaliate against our employees if their names are revealed. We think that counsel for the General Counsel and counsel for the Union have ample other means to test the Witness' credibility, and we strenuously object to the disclosure of names. These are people who obviously have specialized training. They don't have jobs all over the place, job opportunities available to them. Those job opportunities are largely controlled by this Union and we really do not want to imperil their livelihoods.

MR. NELSON: Your Honor, we've been talking names the whole time. He has not identified who they were. He hasn't really identified how many. If we can't get the names then it should be treated as though nobody complained. We don't know if the people were actually members that were hired on that January 1st.

JUDGE LINSKY: I think we got a choice here. We can either strike that testimony from this Witness or he can give the names.

MR. NOVAK: Can we take a break on that?

JUDGE LINSKY: And I'm not sure that he shouldn't really have to give the names in any event. But why don't you see? And of course there are several of these reasons. That's the one about there were four reasons. One was when told it was non-union they didn't object. That's everybody they hired, I guess. When told it was non-union, no one expressed the intent that they wanted the Union to come in. That's with respect to 1 and 4, there's going to be specific names. One was annoyed that the ----

MR. NOVAK: let me take about 5 minutes.

JUDGE LINSKY: Off the record.
(Off the record)

JUDGE LINSKY: On the record.

MR. NOVAK: Respondent withdraws its objection to the question.

JUDGE LINSKY: Okay, you want to repeat it?
MR. LEHMAN: Yes.

Q Can you identify the employees who stated that the Union had not done anything for them?

A Yes, there was Henry Brown and Tony Pursati.

Q And it's your testimony that these conversations took place prior to the denial of recognition or after?

MR. NOVAK: Could counsel give a date? Prior to the recognition is a legal ----

MR. LEHMANN: Okay.

JUDGE LINSKY: When did they tell him that would be one way to get at it, and then put it in the frame of in terms of other events that we know about.

Q Did these conversations occur prior to January 16, 2003?

A Yes.

Q Do you recall providing a sworn statement to the National Labor Relations Board regarding this very same issue?

A I remember providing a statement.

MR. NOVAK: Your Honor, we will object to the characterization of the affidavit being provided for the very same issue.

MR. LEHMANN: Okay, I'll strike that characterization.

Q Now turning to the back page of the affidavit that you have in your hands.

A Yes.

Q Is that your signature?

A Yes.

MR. GARBER: Can we identify which affidavit he has in his hands. He has provided two affidavits for the National Labor Relations Board.

JUDGE LINSKY: What page and what's the date of the affidavit, Mr. Lehmann.

MR. LEHMANN: The date of the affidavit is dated July 18, 2003, and right now I'm asking him to turn to page 6.

MR. GARBER: Excuse me, there were two affidavits given on that date by Mr. McKee to Mr. Lehmann. Can he please identify which affidavit?

MR. LEHMANN: It's for the case, on the front page it's for the case 3-CA-24304.

MR. GARBER: Thank you.

Q Is that your signature?

A Yes.

Q I'm going to draw your attention to the second page. The first full paragraph, the 2nd sentence, it says "More specifically, I had three specific conversations with Henry Brown in which he indicated to me that the Union has not done anything for him. Thus, he did not want to be represented by the Union." Is that an accurate reflection of what it reads?

A Yes, it is.

Q The next sentence says these conversations occurred somewhere between the end of January 2003 to the beginning of June 2003, correct?

A That's what it reads.

Q The very next paragraph goes on to say, I also had conversations with Anthony Pursati regarding his dissatisfaction with how the Union handled the negotiations with the project labor agreement. These conversations occurred in May 2003.

Correct?

A That's what it says." (Tr. 151-161).

It seems clear that the complaints of employees Henry Brown and Anthony Pursati occurred after Respondent refused to recognize and bargain with the Union.

The other reasons advanced by McKee for not recognizing and bargaining with the Union do not demonstrate objective loss of majority support. At most Respondent may have had grounds to petition the Board for an election but Respondent had insufficient reason to either refuse to recognize the Union or to withdraw recognition. See, *Levitz Furniture Co. of the Pacific,* 333 NLRB 717 (2001). Under *Levitz* Respondent would need to show actual loss of majority support to justify its refusal to recognize and bargain with the Union.

Accordingly, Respondent violated Section 8(a)(1) and (5) of the Act when it refused to recognize and bargain with the Union.

F. Polling

In June 2003, Scott McKee testified that based on the reasons he articulated for refusing to recognize the Union and for certain additional reasons he caused a poll to be taken among Respondent's employees as to whether or not they wanted to be represented by the Union.

The additional reasons were that employees Ray O'Dell and Anthony Pursati were helped out by Respondent when they had medical problems and that Bert Lute, a former employee at the Iola Power Plant and a former Union officer told Scott McKee that, according to Union official Michael Scahill, if the employees didn't want the Union to represent them the unfair labor practice charges would be dropped. Scahill denies he said this to Lute but Lute did tell this to McKee. In any event Respondent decided to conduct a *Struksness* poll under the auspices of the American Arbitration Association.[1] And Respondent decided to do it on June 16, 2003 just days before the case was scheduled for trial in the hopes that the results of the poll would obviate the need for the hearing. In any event the hearing was postponed and not heard by me until October 2003.

Respondent refused the Union's request to be present during the polling but did permit Union representatives to be present when the voters were counted. The vote was 7 votes against representation by the Union and O votes for representation by the Union.

It is alleged that the taking of the poll violated Section 8(a)(1) of the Act and I agree because the poll was tainted by the unremedied unfair labor practice of Respondent dating back to January 2003 when Respondent unlawfully refused to recognize and bargain with the Union. See, *Power Electrical Mfg. Co.,* 287 NLRB 969-970 (1987), affd in pertinent part, 906 F.2d 1007 (5th Cir. 1990). Under *Struksness* an employer can not conduct such a poll if it has engaged in unfair labor practices.

Remedy

The remedy for Respondent's unlawfully conducting a poll will be a cease and desist order and the posting of an appropriate notice.

The remedy for Respondent's unlawful refusal to recognize and bargain with the Union will be a cease and desist order, the posting of an appropriate notice, and a requirement that, upon request from the Union, that Respondent recognize the Union and bargain with the Union in good faith. Needless to say once the old Iola Power Plant was decommissioned the service of some of employees hired to run the Iola Power Plant from January 2003 until it closed may be unnecessary. In that event effects bargaining would be in order, i.e., severance pay, etc. On the other hand some or maybe even all employees went to other jobs at the new co-generation facility.

One of the problems Respondent and the Union had in reaching an agreement on a contract in December 2002 was that Respondent wanted to limit a contract to 18 months or shorter provided the Iola Power Plant was decommissioned and the new cogeneration facility on line.

[1] *Struksness Construction Co.,* 165 NLRB 1062 (1967).

Conclusions of Law

1. Respondent, Siemens Building Technologies, Inc., is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

2. The Union, International Union of Operating Engineers, Local 832, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act when it refused to recognize the Union and bargain with it.

4. Respondent violated Section 8(a)(1) of the Act when it conducted an unlawful poll as to whether its employees wished to be represented by the Union or not.

5. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record I issue the following recommended[2]

ORDER

Respondent, Siemens Building Technologies, Inc., its offices, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Unlawfully refusing to recognize and bargain with the Union.

(b) Unlawfully conducting a poll among its employees as to whether they want to be represented by the Union or not.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request recognize the Union as the collective bargaining representative of the employees in the appropriate unit and bargain with the Union in good faith.

(b) Within 14 days after service by the Region, post at its facility in Rochester, New York and all other places where notices customarily are posted, copies of the attached notice marked

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

"Appendix A."[3] Copies of the notice, on forms provided by the Regional Director for Region 3 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2003.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 25, 2004

Martin J. Linsky
Administrative Law Judge

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unlawfully refuse to recognize and bargain with the Union as your collective bargaining representative.

WE WILL NOT unlawfully conduct a poll to determine if our employees wish to be represented by the Union or not.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal Law.

WE WILL recognize the Union as your collective bargaining representative and upon request bargain with the Union regarding hours, wages, and other terms and conditions of employment.

SIEMENS BUILDING TECHNOLOGIES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Federal Building, Room 901, Buffalo, NY 14202-2387
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.